IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

NO. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, FRED WOLTER, ESTHER KUSMIEREK, ESTHER GREENMEIER, SOPHIE KOSCHIERSKI, FRANCES CHANDEK, AGNES TANKO, HARRY ROSE, DAN ROKNICH, TONY CALABRESA, EDWARD OKULSKI, PETER BLAZEK, EILIF TOMTE, EDWARD LARSON AND MIKE DEMSKI,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, and ALLEN-BRADLEY COMPANY, a Wisconsin Corporation,

Appellees.

BRIEF IN REPLY TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

LEE PRESSMAN,
JOSEPH KOVNER,
ANTHONY WAYNE SMITH,
Attorneys for Appellants.

MAX E. GELINE,
Of Counsel.

HAMMERSMITH-KORTMEYER CO. MILWAUKEE

INDEX

Page

SUBJECT INDEX

Page

Table of Cases Cited

Statutes Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

NO.

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAI, RADIO AND MACHINE WORKERS OF AMERICA, FRED WOLTER, ESTHER KUSMIEREK, ESTHER GREENMEIER, SOPHIE KOSCHIERSKI, FRANCES CHANDEK, AGNES TANKO, HARRY ROSE, DAN ROKNICH, TONY CALABRESA, EDWARD OKULSKI, PETER BLAZEK, EILIF TOMTE, EDWARD LARSON AND MIKE DEMSKI,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, and ALLEN-BRADLEY COMPANY, a Wisconsin Corporation,

Appellees.

BRIEF IN REPLY TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Now come the appellants and take issue with appellees' motion to dismiss or affirm; and respectively show to this Honorable Court that appellees' statement opposing jurisdiction is without merit.

NATURE OF ACTION AND RULING BELOW

Appellants adopt as their statement of the nature of the Case and ruling below the statements as set forth in Sections 2 to 7 inclusive, of the statement of jurisdiction heretofore filed with the Clerk of this Court.

Appellants, in reply to the motion of appellees to dismiss or affirm and statement opposing jurisdiction filed June 16, 1941 show as follows:

SUMMARY OF ARGUMENT

Point 1. The Supreme Court of the State of Wisconsin erroneously construed a statute of the United States, namely, the National Labor Relations Act, 49 Stat. 449.

Point 2. There was drawn in question the validity of a statute of the State of Wisconsin on the ground of its being repugnant to the Constitution and a law of the United States and the decision of the Supreme Court of the State of Wisconsin was in favor of its validity.

Point 3. The Supreme Court of the State of Wisconsin erroneously denied certain rights, privileges and immunities specially set up and claimed by appellant under a statute of the United States.

Point 4. The decision by the Wisconsin Supreme Court required analysis and exposition of the rights, benefits and privileges of appellants under the Federal Statute, and Construction of a Federal Statute in relation to the State Act regulating the same subject, in order to render a decision on issues in the case.

ARGUMENT

Point 1.

The Supreme Court of the State of Wisconsin Erroneously Construed a Statute of the United States.

By stipulation, it was conceded that the business of appellee, Allen-Bradley Company, is of such character and extent that it is subject to the National Labor Relations Act. Therefore appellant union and individual appellants are entitled to protection and benefits of the National Act. The Wisconsin Supreme Court erroneously construed that the National Act was inapplicable to the parties involved in the instant case because no order has been issued by the National Board, with respect to the labor controversy between the parties involved in this case.

The Wisconsin Court erred in the following statements contained in the reported decision, 237 Wis. 171, construing the National Act:

> "In determining whether the Employment Peace Act is repugnant to the provisions of the National Labor Relations Act, it is of little moment whether we say that the National Act confers rights and privileges upon employees or organizations of employees, or how we describe its effect upon employees. Both from the language of the act and the construction which has been placed upon it by the United States Supreme Court, it is apparent that the act operates effectively in a particular case only in the way and to the extent which is determined by the orders of the National Labor Relations Board. If an employer indulges in Sec. 8 of the act, the sole redress of the employees is to charge the employer with such unfair labor practices before the Board. When such a charge is made, the Board may or may not in its discretion decide to take jurisdiction of

the controversy. Its determination will depend upon whether it finds the situation is such as to substantially affect interstate commerce. When it acts, the order of the Board determines the manner in which and the extent to which the act shall be effectively applied to the particular situation being dealt with. If the determination of the Board together with the force of public opinion is not sufficiently persuasive to bring about compliance with the Board's order, the Board may then apply to the proper Circuit Court of Appeals for enforcement of the order." 237 Wis. at p. 178.

"The vital question for consideration in this case is not whether there is repugnancy in the language of the two acts but is one of jurisdiction between the state and federal governments. Inasmuch as the National Labor Relations Act depends for its effective operation upon the determination of the National Labor Relations Board, there can be no conflict between the acts until they are applied to the same labor dispute. They are upon two different planes. The National Labor Relations Act deals with labor relations only as a means of protecting interstate commerce. The Employment Peace Act deals with labor relations in the exercise of the police power of the state. To the extent that the orders of the National Labor Relations Board apply in a particular controversy, the jurisdiction of state authorities, both administrative and judicial, is ousted. When under the facts of a particular case interstate commerce is substantially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any state authority to the contrary notwithstanding.

"In this case the employer has never been charged with an unfair labor practice nor has the National Labor Relations Board ever been requested to determine who is the proper bargaining representative. *Consequently, the National Labor Relations Act has*

never been applied to the labor dispute here under consideration and it may never be applied, depending upon the exercise of the discretion of the National Labor Relations Board. Therefore, there can be no conflict of jurisdiction between state and federal authority in this case. This conclusion does not depend upon the language of the two acts. If the language of the Employment Peace Act was identical with that of the National Labor Relations Act and in a particular case the National Labor Relations Board took jurisdiction, the jurisdiction of the Wisconsin Employment Labor Relations Board would be ousted notwithstanding the identity in language of the two acts and the determination made by the National Labor Relations Board would be controlling. The action of Congress leaves to the state full authority to deal with labor relations generally. Congress exercises its power in the interest of interstate commerce. With that subject the state has nothing to do. Its power to regulate labor relations is derived from an entirely different source,—the power to promote the peace, morals, health, good order and general welfare of the people as a whole. It may not, however, in the exercise of that power encroach upon the federal domain." 237 Wis. at p. 179.

"Conflict between the two acts can arise only with respect to orders issued by each of the Boards dealing with the same situation. No matter how arrived at by the boards there can be no conflict if there is none in the orders dealing with the same labor dispute. For the reason stated we discover no conflict in the two acts on account of the difference of definitions of the terms to be found in them." 237 Wis. at p. 184.

"In the case of the National Labor Relations Act the jurisdiction of the federal authority is not aroused until such a situation has arisen that interstate commerce is impeded or obstructed On the other hand,

state action is regulatory in its nature and is designed to bring about industrial peace, regular and adequate income for the employee and uninterrupted production of goods and services for the promotion of the general welfare. The federal act deals with a situation that has arisen. The state act seeks to forestall action which may lead to disorder and loss of life and property." 237 Wis. at p. 184.

The foregoing quotations from the decision are in conflict with the construction of the National Act contained in:

N.L.R.B. vs. Newport News Shipbuilding and Drydock Co., 308 U.S. 241, 60 S. at 246, 84 L. Ed. 219.

Republic Steel Corp. vs. N.L.R.B., 311 U.S. 7, 85 L. Ed. 1.

N.L.R.B. vs. Jones and Laughlin Steel Corp., 301 U.S. 1.

Consolidated Edison Company vs. N.L.R.B., 305 U.S. 197.

A.P. of L. vs. N.L.R.B., 308 U.S. 401, 60 S. Ct. 300, 84 L. Ed. 347.

It is clear that the National Labor Relations Act was before the Court and was construed in relation to Constitutional issues raised in the pleadings. This assuredly raises a substantial Federal Question establishing this Court's jurisdiction.

Point 2.

There Was Drawn in Question the Validity of a Statute of the State of Wisconsin on the Ground of its Being Repugnant to the Constitution and a Law of the United States and the Decision of the Supreme Court of the State of Wisconsin was in Favor of its Validity.

The pleadings establish that the Wisconsin Act and the jurisdiction of the Wisconsin Board were challenged as unconstitutional as applied to parties subject to National Act, by reason of the interstate character of the company's business. The two main grounds asserted were that the two Acts generally regulate the same subject of labor relations and collective bargaining and that the National Act has pre-empted the subject; or, if not pre-empted, the Wisconsin Employment Peace Act as applied to interstate commerce is so inconsistent and in conflict with the National Act that the two acts cannot consistently stand together.

The Wisconsin Court refers to these issues in the following language:

> "While appellant used the term 'unconstitutional,' their argument is that the state law can have no application to a manufacturer subject to the National Labor Relations Act because the jurisdiction of the National Labor Relations Act has pre-empted the field of labor relations in cases where the employer is carrying on an industry in interstate commerce.
>
> "We enter upon an examination of the contentions of the plaintiffs and the arguments made in support thereof fully aware that we are dealing with one of the most difficult as well as delicate questions presented to the courts of this country, to wit: the delimitation of the power of the state and the federal government over a matter which is subject to some

extent to their concurrent jurisdiction." 237 Wis. at p. 171.

The Wisconsin Supreme Court rejected the constitutional objections above set forth in sustaining the constitutionality of the Wisconsin Act as applied to interstate commerce.

In their statement opposing jurisdiction appellees assume that issues raised were correctly decided by the Wisconsin Court. These very assumptions establish the substantial character of the Federal question.

No decision has as yet been rendered by this Court, determining whether a State Labor Relations Act may validly be enforced as to enterprises engaged in interstate commerce and subject to the National Act. The Wisconsin Supreme Court, in the instant case, and in *F. Reuping Leather Co. vs. Wisconsin Labor Relations Board,* 228 Wis. 473, and the New York Court of Appeals in *Davega City Radio, Inc. vs. New York Labor Relations Board,* 281 N.Y. 13, 22 N.E. (2nd) 145, have held that the National Act has not pre-empted the subject, although enacted pursuant to the Commerce Clause, and that the State Labor Relations Act may validly be enforced as to employers whose business constitutes interstate commerce.

The public importance of a determination of this question is evident. Particularly is this so in this case where the plan of regulation of the subject as embodied in the Wisconsin Act is in violent conflict with the National Act. The Congressional records establish that the Wisconsin Act embodies many provisions which Congress has refused to include in the National Act.

So long as the issues raised in this case are undetermined, the National Policy as to labor relations of industries subject to the National Act, may be interfered

with and undermined by enforcement of a contrary and conflicting State Statute regulating the same subject.

The decision affirming the constitutionality of the Wisconsin Employment Peace Act, as applied to interstate commerce in the instant case, raises a Federal question of the extent and exclusiveness of Federal authority over labor relations regulated by the National Act in the exercise of the powers conferred on Congress under the Commerce Clause.

Point 3.

The Supreme Court of the State of Wisconsin Erroneously Denied Certain Rights, Privileges and Immunities Specially Set Up and Claimed by Appellant Under a Statute of the United States.

Under Section 2, (3), N.L.R.A. as construed in numerous decisions, set forth in our statement of jurisdiction, the fourteen individual strikers are entitled to the continued protection and benefits of the National Act even though they had committed the minor acts of violence or misconduct set forth in the findings of fact. Appellees urge that in this case the Wisconsin Supreme Court had construed the "final order" as not having the effect of terminating the employee status of the fourteen appellants because no specific order was issued by the State Board to that effect.

The Wisconsin Supreme Court, in arriving at the foregoing conclusion, did not deal with the issue which appellants raised. Appellants never contended that the final order had the effect of terminating their actual employee status. It was contended that the conclusion of law, finding that they, as strikers, had committed employee unfair labor practices resulted in the loss of

their statutory classification as "employees" entitled to statutory protection from employer unfair labor practices and otherwise entitled to statutory protection of their rights to self organization and collective bargaining which exists in favor of individuals who fit into the definition of "employee" under Sec. 111.02 (3) of the Wisconsin Act. This section specifically provides that when used in the Act, the term "employee" shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute and *who has not been found to have committed or to have been a party to any unfair* labor practice set forth in Section 111.06 (2), Wis. Stat. (1939). The "Final Order" specifically found that as strikers, the individual appellants had committed employee unfair labor practices. This resulted in the loss of their status as "employees" for all purposes of the Wisconsin Act. The decision failed completely to consider the special effect of the Wisconsin Board's finding of unfair labor practices by a striking employee—as distinguished from an employee not on strike—on his statutory privileges and immunities which otherwise exist. By not considering this issue in its decision, the Court has not eliminated the conflict between the two acts in this vital respect. In legal effect, affirmance of the Final Order destroys the employee status for statutory purposes, which continues under the National Act for like purposes.

Furthermore, the decision of the Wisconsin Supreme Court in this case is in conflict with its decision on precisely the same question in *Hotel and Restaurant Employees International Alliance, Local 122 vs. Wisconsin Employment Relations Board*, 236 Wis. 329, 294 N.W. 623. In this case, decided two months before the decision in the instant case, the Court declared that

a striking employee loses his employee status by engaging in an unauthorized strike, which, under the Wisconsin Act, constitutes an unfair labor practice even though no specific order to that effect was made by the Wisconsin Board. In view of these conflicting decisions, it is impossible to determine whether the Wisconsin Court intended to reverse its ruling, as made in the aforementioned case, and the effect of that decision on appellants in this case.

Although the Wisconsin Supreme Court, in construing the Wisconsin Act in this case, ruled that appellants' status as employees of the Allen-Bradley Co. continued —which we did not question—it did not rule that such employee-status continued for purposes of the Wisconsin Act so that the Wisconsin Board would be legally obligated to protect appellants from employer unfair labor practices and otherwise permit them to exercise the statutory benefits accruing to "employees," as defined in the Act. The decision is completely silent on this point. The Wisconsin Act is clear, by its unequivocal terms, that such immunities and protection are extinguished as a result of the Board's findings, because appellants no longer fit into the classification of employees protected by the Act.

Regardless of what reasoning was contained in its decision, the Wisconsin Supreme Court affirmed the final order of the Board, which by the terms of the Wisconsin Act, excludes appellants from the continuance of their employee-status for the purposes of the Act. The effect of this ruling is to authorize the employer to discharge the appellants without regard as to whether such discharge constitutes an employer unfair labor practice prohibited by the National Act. In this respect, the Board's

"Final Order" runs counter to the duty imposed upon the employer by the National Act, not to commit a discriminatory discharge of the appellants. The effect of the Board's "Final Order" on appellants' benefits and immunities as striking employees under the National Act constitutes a substantial Federal question.

Point 4.

The Decision by the Wisconsin Supreme Court Required Analysis and Exposition of the Rights, Benefits and Privileges of Appellants Under the Federal Statute, and Construction of a Federal Statute in Relation to the State Act Regulating the Same Subject, in Order to Render a Decision on Issues in the Case.

No more persuasive argument is necessary to support the jurisdiction of this court than the contents of the decision itself, which revolves about an analysis and exposition of the rights, privileges and immunities or lack thereof of "employees" under the National Act, and the construction and applicability to the appellants of said National Act. The basis for the Order affirming the jurisdiction of the State Board involved the necessary relation between the Federal statute and the State statute insofar as both were regulatory of the same subject involving interstate commerce. These tests establish the substantial character of the Federal question involved in the decision of the Wisconsin Supreme Court.

Wherefore appellants respectfully submit that the appellees' motion to dismiss or affirm the decision of the Supreme Court of the State of Wisconsin should be

denied; that appellees' statement in opposition to jurisdiction is without merit and should be disregarded; that this honorable court has jurisdiction to hear this appeal under Sec. 237 (A) of the Judicial Court (28 U.S.C. 344 A); that this Honorable Court hear appellants' appeal upon its merits. In any event, the appellants submit that a substantial and important Federal question is presented; that certain titles, privileges, rights and immunities specifically set up and claimed by appellants under a statute of the United States, to-wit: the National Labor Relations Board were denied and ignored, and further submit that this Honorable Court has jurisdiction to review such decision of the Supreme Court of the State of Wisconsin under the provisions of the Section 237 B and C of the Judicial Code (28 U.S.C. 344 B.C.)

Respectfully submitted,

LEE PRESSMAN,
JOSEPH KOVNER,
ANTHONY WAYNE SMITH,
Attorneys for Appellants.

MAX E. GELINE,
Of Counsel.